Supreme Court, U.S.
FILED

03 235 AUG 11 2003

No.

In the

Supreme Court of the United States

LINDA MANIATTY,

Petitioner,

– against –

UNUMPROVIDENT CORPORATION, FIRST UNUM LIFE INSURANCE COMPANY, SBC GROUP LONG TERM DISABILITY PLAN, UBS AG LONG TERM DISABILITY PLAN (AND SUCCESSORS IN INTEREST),

Respondents.

PETITION FOR WRIT OF CERTIORARI

FUSCO, BRANDENSTEIN & RADA, P.C.
By: ABA HEIMAN, ESQ.
Attorneys for Petitioner
180 Froehlich Farm Boulevard
Woodbury, New York 11797
(516) 496-0400

QUESTION PRESENTED

Where a disability insurance policy or plan does not define "objective evidence" and provides disability benefits where the insured, because of injury or illness, is unable to perform the duties of her regular occupation, may the insurer require disability be proven by "objective evidence"?

PARTIES TO THE PROCEEDING

Petitioner is Linda Maniatty.

Respondents are UNUMProvident Corporation, First UNUM Life Insurance Company, SBC Group Long Term Disability Plan, UBS AG Long Term Disability Plan (and successors in interest).

STATEMENT PURSUANT TO RULE 29.6

Respondent First UNUM Life Insurance Company is owned by UNUM Holding Company. UNUMProvident Corporation owns UNUM Holding Company. The stock of UNUMProvident Corporation is publicly held.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties To The Proceeding	i
Statement Pursuant To Rule 29.6	i
Table Of Contents	ii
Table Of Authorities	iv
Basis For Jurisdiction	1
Statutory Provision Involved	1
Statement Of The Case	
A. Administrative Claim	1
B. Facts Presented	2
C. The District Court's Memorandum Order (Appendix B)	7
D. Summary Order By The United States Court Of Appeals	8
Reason For Granting The Writ	
A. Introduction	8
B. Contractual	9
C. The District Court Unreasonably Dismissed Petitioner's Subjective Complaints And Ignored Jurisprudence Acknowledging The Viability Of Claims Based Upon Chronic Fatigue Syndrome and Fibromyalgia	10

D. The District Court's Misunderstanding of CFS And Its Scientific Basis As Applied To Petitioner's Claim And The District Court's Erroneous Limitation Of "*Objective Material Evidence*" To The Post-Surgical MRI (Which Was Misconstrued) 12

Conclusion 14

APPENDIX A — The Decision By The United States Court Of Appeals For The Second Circuit APP-1

APPENDIX B — The Decision By The United States District Court For The Southern District Of New York APP-3

TABLE OF AUTHORITIES

Page(s)

Cases:

Baily v. Provident Life & Accident Ins. Co., 3: 99-CV-394/LAC (D.C. Fla. June 13, 2000) 9

Clausen v. Standard Ins. Co., 961 F.Supp. 1446 (D.Col. 1997) 11

Cohen v. Secretary, 964 F.2d 524 (6th Cir. 1992) 11

Cohen v. Standard Ins. Co., 155 F.Supp.2d 346 (E.D. Pa. 2001) 9

Connors v. Connecticut Gen'l Life Ins. Co., 272 F.3d 127 (2d Cir. 2001) 10

DeCastris v. State Employees Retirement System Of Illinois, 679 N.E.2d 825 (Ill. 1997) 12

Durr v. Metropolitan Life Ins. Co., 15 F.Supp.2d 205 (D.Conn. 1998) 9

Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield of Alabama, 41 F.3d 1476 (11th Cir. 1995), *cert den,* 115 S.Ct. 2002 (1995) 9, 10

Friedrich v. Intel Corp., 181 F.3d 1105 (9th Cir. 1999) 9

Hallgring v. Callahan, 975 F.Supp. 84 (D.Mass. 1997) 11

Herzberger v. Standard Ins. Co., 205 F.3d 327 (7th Cir. 2000) 9

Hilton v. Apfel, 56 Soc.Sec.Rep.Serv. 156, 1998 WL 241616 (S.D.N.Y. 1998) 11

Kinstler v. First Reliance Standard Life Ins. Co., 181 F.3d 243 (2d Cir. 1999) 10

Locher v. UNUM Life Ins. Co. of America, 126 F.Supp.2d 769 (S.D.N.Y. 2001) 11

Lunan v. Apfel, 67 Soc.Sec.Rep.Serv. 114, 2000 WL 287988 (N.D.N.Y) 11

Mitchell v. Eastman Kodak Co., 113 F.3d 433 (3d Cir. 1997) 9, 11, 12

Monroe v. Pacific Telesis Group Comprehensive Disability Benefits Plan, 971 F.Supp. 1310 (C.D.Cal. 1997) 12

Opgenorth v. Shalala, 897 F.Supp. 1199 (E.D.Wis. 1995) 11

Pelchat v. UNUM Life Ins. Co. of America, No. 3:02CV7282, 2003 WL 21105075 (N.D.Ohio May 12, 2003) 9

Reddick v. Chater, 157 F.3d 715 (9th Cir. 1998) 11

Rose v. Shalala, 34 F.3d 13 (1st Cir. 1994) 11

Russell v. UNUM Life Ins. Co. of America, 40 F.Supp.2d 747 (D.S.C. 1999) 12

Saffle v. Sierra Pacific Power Co., 85 F.3d 455 (9th Cir. 1996) 10

Saliamonis v. CNA, 127 F.Supp.2d 997 (N.D. Ill. 2001) 9

Sansavera v. E.I. DuPont de Nemours & Co., 859 F.Supp. 106 (S.D.N.Y. 1994) 11

Sarchet v. Chater, 78 F.3d 305 (7th Cir. 1996) 12

Sisco v. Dept. of HHS, 10 F.3d 739
(10th Cir. 1993) 11

Weiler v. Shalala, 922 F.Supp. 689
(D.Mass. 1996) 12

Statutes, Rules and Regulations:

Supreme Court Rule 10(a) 8

Supreme Court Rule 29.6 i

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

29 U.S.C. § 1132(a)(1)(B) 1

Other:

Fukuda, K. "The Chronic Fatigue Syndrome:
A Comprehensive Approach to its Definition
and Study," *Annals of Internal Medicine*,
1994: 121:953-959 11

Komaroff, A.L. "The Physical Basis of CFS," *CFS
Research Review* (CFIDS Assoc. of America)
vol. 1, issue 2 (Spring 2000) 11

Wolfe, F. "The American College of Rheumatology
1990 Criteria For the Classification of Fibromyalgia,"
33 *Arthritis and Rheumatism* 160-72 (Feb. 1990) 12

BASIS FOR JURISDICTION

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. By Summary Order of May 15, 2003 (62 Fed.Appx. 413, 2003 WL 21105390) (Appendix A), the Second Circuit affirmed the decision of the district court, 218 F.Supp.2d 500 (S.D.N.Y. 2002) (Appendix B). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Petitioner sought review by the district court, pursuant to 29 U.S.C. § 1132(a)(1)(B) under the Employee Retirement Income and Security Act ["ERISA"], of a final administrative determination by defendants, which terminated her long-term disability benefits. The jurisdiction of the district court was thus based upon federal question, 28 U.S.C. § 1331. Appellate jurisdiction in the court of appeals was under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. *Administrative Claim*

Petitioner is covered by an employer-sponsored, group long-term disability policy (funded by First UNUM Life Insurance Company), which is an ERISA plan, and it provided her with $5,000 per month until UNUMProvident Corporation (the claims administrator under the Plan) terminated benefits effective October 18, 1999. Following petitioner's request for administrative review of the adverse determination, UNUMProvident's affirmation on July 14, 2000 became the final administrative determination. It stated that petitioner's doctor "does not indicate or provide any objective evidence of a disorder that would provide medical restrictions and limitations that would continue to preclude Ms. Maniatty from performing the material duties of her occupation beyond October 17, 1999." It also stated:

> Since July 1999, the insured has been complaining of fatigue in addition to back pain, and has now been diagnosed wit [sic] chronic fatigue syndrome and fibromyalgia by several physicians who saw the insured only once at the request of her lawyer.

Nothing else was mentioned in the letter concerning these illnesses. Having exhausted administrative remedies, petitioner sought judicial review.

B. *Facts Presented*

In the district court, petitioner's principal brief initially addressed her orthopedic injury by noting that following her lumbar spinal surgery in September 1997, her pain continued, her neurosurgeon ordered an MRI in May 1998, and it revealed:

> Status post left-sided discectomy at L5-S1 with small residual disc protrusion and surrounding scar tissue. Minimal displacement proteriorly of the left S1 root.

That was the same nerve root that was involved in her surgery.

In June 1998, after the MRI, Dr. Collias saw petitioner in consultation. While suggesting that decompression of the S1 root during the September 1997 discectomy was adequate, his impression was that there was "a double structure in the left S1 nerve root canal . . . to suggest there might be a retained fragment there although I am not entirely certain." Later that month, Dr. Cammisa (another consultation) reviewed the May 1998 MRI films and his impression was that they revealed a "Recurrent herniated nucleus pulposis, left L5-S1, with degenerative disease." More than a year later, following months of physical therapy, petitioner saw yet another spinal surgeon, Dr. O'Leary, in August 1999, who suggested more rehabilitation, and if no improvement in six months, then "she might need a spinal fusion at the L5/S1 segment." Dr. Simotas, the physiatrist to whom Dr. O'Leary

had referred her, indicated in November 1999 that he saw no evidence of recurrent disc herniation or nerve root compression on the May 1998 MRI, but possibly a fragment in the left S1 foramen. Dr. Lavyne, the treating neurosurgeon, writes on June 3, 1998 that the May 1998 MRI shows petitioner suffered a:

> small recurrent disc herniation which is accounting for her slow recovery. She would like to be able to return to work as soon as possible, but her condition prevents her from doing so. . . .

He also found "residual weakness in the left lower extremity" on her last neurological examination.

Dr. Bachrach (an osteopath) examined petitioner and treated her with physical therapy and injections into her sacroiliac (with Marcaine) between October 1998 and January 1999. His Physical Capacities Evaluation also indicated that plaintiff could only sit one or two hours in an eight-hour day and was not even able to work part-time. During this period of time, from August of 1998 through December 1998, petitioner had undergone physical therapy. An assessment on August 10, 1998 indicated that she had severe pain with sitting, and radiating pain in the lower left extremity with standing or walking. Notably, the physical therapist (Ms. Erni) found that petitioner's endurance was diminished and her fatigue markedly increased, to the point where she was unable to sit for prolonged periods or perform activities of daily living.

On February 2, 1999, Dr. Lavyne completed a form for UNUM indicating restrictions and limitations primarily as the inability to sit comfortably, remained hopeful she might eventually return to part-time work, but in the meantime estimated her ability to sit, stand, and walk as only one hour each in an eight-hour workday. On July 15, 1999, Dr. Lavyne opined that while her neurologic examination had returned to normal, his impression was that plaintiff's "chronic lower

back pain . . . is a residual of the nerve injury and not likely to improve further." He also remarked that she was complaining of fatigue and suggested it might be a symptom of depression, for which he referred her back to her internist. In September 1999, Dr. Lavyne responded to UNUM's inquiry as to his basis for concluding that the lower back pain was "a residual of the nerve injury and not likely to improve," saying it was the "clinical examination and my experience caring for neurologically injured." On November 22, 1999, he wrote to UNUM's Dr. Alexander:

> In my estimation, this chronic lower back pain is disabling her. Although her neurologic examination is normal, I have not performed a detailed sensory examination of her lower sacral dermatomes and perhaps there are objective bedside signs of sensory disorder. Regardless of the presence or absence of neurologic deficits, she is in pain and unable to return to work.

Dr. Balensweig examined Ms. Maniatty on January 17, 2000 and provided a comprehensive orthopedic report. He notes her complaints of difficulty with sitting and standing (both about ten minutes) and how she spends most of every day and night reclining or sleeping. Clinical examination was remarkable for L5 sensory loss on the left and reflex deficits in the left knee jerk, left posterior tibial, left gluteal, and left hamstring. There was also tenderness at the left sciatic notch and coccyx. Dr. Balensweig reviews many of the reports already discussed above and then his impression, in pertinent part, was that:

> This patient has a recurrent disc herniation in the left foramen at L5-S1, scar tissue and positive neurological findings. I would recommend she be operated upon by Dr. Patrick O'Leary and have a fusion at L5-S1 plus a laminectomy again with removal of disc material in the foramen and opening up of the foramen.

A Physical Capacities Evaluation completed by Dr. Balensweig shows that petitioner, during an eight-hour day, can sit less than two hours, stand less than one hour, and needs to recline almost continuously (which makes it clear that, in his opinion, plaintiff was incapable of performing even a part-time job).

Petitioner's principal brief in the district court then addressed her Chronic Fatigue Syndrome ["CFS"] and Fibromyalgia ["FM"]. Dr. Hart (primary care internist) reports on March 27, 1998 that plaintiff is "[e]xhausted" and then repeats that in a letter dated April 8, 1999.

Eveline Erni, P.T. reported to Dr. Lavyne on August 10, 1998 that plaintiff "has decreased endurance and extreme fatigue w/minor activities." On November 30, 1998 physical therapy notes state: "greatly bothered by fatigue." On December 10, 1998, it is noted that her sitting time has increased to thirty minutes, an improvement from two months before.

Dr. Globus was seen in consultation on June 21, 1999 and a lab test ruled out Lyme disease. On a questionnaire form petitioner responded to the question, "Do you tire very easily?" by answering, "only since my operation. . . ." His history mentions that she can't sit for more than thirty minutes and is "Exhausted if out for more than 2 hours — If out for more than 2 hours . . . then several days to recover."

In an update of February 9, 2000, Dr. Hart writes that "shortly after her surgery, she developed overwhelming fatigue, occasional sweats, nausea and light-headedness." Dr. Hart completed an Estimated Functional Abilities form for UNUM dated July 14, 1999, which indicates an inability to perform even sedentary activity.[1]

---

[1] There was a highly prejudicial blunder by the district court regarding this form. The Memorandum Order states: "and a third doctor, Dr. Hart, reported sedentary capacity. AR 295-96". If you look at AR 295-96, it's a UNUM nurse's review, which says: "EFA [Estimated Functional Abilities]

Dr. Levine examined on December 3, 1999. The history recorded was consistent with that of Dr. Hart and Dr. Globus in the complaint of post-surgical pain and exhaustion. Dr. Levine then identified presenting symptoms from petitioner:

> extreme exhaustion even after minimal exertion; significant muscle pain in the shoulders, neck, and lower back; and sleep disturbances. She is unable to sit for more than about 1/2 an hour no more than a few times a day; she cannot stand for more than 10 minutes at a time no more than 3 times a day; she cannot read or write for long periods of time; and she does not feel rested when she awakens.

Dr. Levine's clinical examination was positive for:

> small lymph nodes in the anterior cervical area . . . slightly diminished motor strength in all extremities; and she had bilateral trigger points in her neck, shoulders, elbows, and knees. Her labwork indicated prior exposure to Human Herpes Virus 6, which has been implicated as a causative agent in CFS/FM....

Dr. Levine diagnosed CFS and FM and then noted resultant functional limitations which left petitioner totally disabled.

Lastly, there is a consultation with Dr. Podell dated April 5, 2000. After a detailed review of petitioner's history and medical records, his clinical examination pertinently revealed:

---

form from Dr. Hart . . . MD of the opinion clmnt [sic] has sedentary capacity." But that's not what Dr. Hart wrote at all. The form Dr. Hart completed shows that petitioner is unable to engage in "light", "medium", or "heavy" activity, and can only engage in "sedentary" activity for a half hour in an eight-hour day. Thus the misleading nurse's note, misconstruing the form completed by Dr. Hart, resulted in the district court's misbegotten conclusion that petitioner's own doctor admitted she could perform a sedentary occupation. For the district court to rely upon UNUM's nurse's note to reflect what petitioner's treating physician had said, without bothering to confirm it, was both arbitrary and clearly erroneous.

> increased lymph glands on the left and right lateral neck. She had a 3+ post-nasal drip and a 1+ purple crescent of the posterior pharynx. She has a fullness and tenderness in the right and left supraclavicular areas. All 14 of the diagnostic fibromyalgia tender points tested positive.

Dr. Podell found that petitioner meets the criteria for CFS established by the Centers for Disease Control ["CDC"], which he cites and explains.

Dr. Levine's clinical findings were confirmed by Dr. Podell. Both found cervical lymph nodes and bilateral trigger points on examination and both reported similar symptoms. Dr. Podell likewise confirms total disability, not just for petitioner's own occupation, but also for "any job full or part time."

C. *The District Court's Memorandum Order (Appendix B)*

The Memorandum Order indicated (at APP-7) that UNUM had concluded that petitioner's complaints regarding her low back pain were "subjective in nature, without *objective evidence* for continued lumbar dysfunction" (emphasis ours) and that she was no longer disabled. Specifically, UNUM said Dr. Lavyne was unable to "point to any *objective evidence* supporting plaintiff's pain complaints" (emphasis ours).

The Memorandum Order then agreed with UNUM that petitioner's raising the additional illnesses of CFS and FM for the first time during her administrative appeal was reason for skepticism (apparently oblivious to the fact that she had not been diagnosed with these illnesses until *after* her benefits had been terminated). It further noted that a UNUM review physician reviewed reports concerning CFS and FM from doctors Levine and Podell and concluded that their findings were based upon petitioner's subjective complaints. The Memorandum Order then dismissed petitioner's argument that the Plan itself does not state that *objective evidence* is required to establish disability by inferentially reasoning

that requiring proof of disability "connotes objectivity" (at APP-9) and concludes (at APP-9): "Thus, given the virtual absence of any *material objective evidence* to support plaintiff's claim, it can hardly be said that the administrator acted in an arbitrary and capricious matter [sic] in rejecting plaintiff's claim" (emphasis ours).

As if to bolster its opinion, the Memorandum and Order gratuitously claims (at APP-9) that it would have reached the same conclusion under a *de novo* standard because the only *material objective evidence* was the post surgical MRI, which did not conclusively establish that petitioner qualified for long-term disability.

D. *Summary Order By The United States Court Of Appeals (Appendix A)*

The Second Circuit did not bother to discuss any of petitioner's arguments below in summarily affirming the decision of the district court. Instead it curtly concluded that the district court did not "abuse its discretion in finding that plaintiff is unable to demonstrate that she is unable to perform each of the material duties of her regular occupation because of injury or sickness."

REASON FOR GRANTING THE WRIT

A. *Introduction*

Supreme Court Rule 10(a) indicates that it is within this Court's discretion to grant a writ of certiorari where a United States Court of Appeals:

> has decided an important federal question in a way that . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power . . .

In support of its decision that UNUM could require *material objective evidence* of disability, even though *material objective evidence* is neither defined nor required by the Plan, defendants and the district court cited only one, unreported case, *Baily v. Provident Life & Accident Ins. Co.*, 3: 99-CV-394/LAC (D.C. Fla. June 13, 2000)! The case law from various circuit courts of appeals, *infra*, is to the contrary and even the Eleventh Circuit unequivocally holds: "A claims administrator's decision is arbitrary and capricious where new requirements for coverage are added to those enumerated in the plan. *Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1484 (11th Cir. 1995), *cert den,* 115 S.Ct. 2002 (1995).

Moreover, where *material objective evidence* is neither defined nor required by a Plan, superimposing that requirement for various illnesses, e.g. CFS and FM, is draconian and will unfairly and adversely impact thousands of ERISA disability claimants.

B. *Contractual*

In petitioner's principal brief in the Court of Appeals, she argued (Principal Brief at 25):

> As the Policy is a contract, defendants may not simply add new terms. *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433 (3d Cir. 1997); *Cohen v. Standard Ins. Co.*, 155 F.Supp.2d 346 (E.D. Pa. 2001); *Saliamonis v. CNA*, 127 F.Supp.2d 997, 1000 (N.D. Ill. 2001); *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 330 (7th Cir. 2000). . . [2]

---

[2] Insurers are free to define "objective evidence" and have done so in other LTD plans. *See Friedrich v. Intel Corp.*, 181 F.3d 1105 (9th Cir. 1999). Some other cases holding ERISA claims administrators may not require "objective evidence" when it is not required by the plan language are *Durr v. Metropolitan Life Ins. Co.*, 15 F.Supp.2d 205, 213 (D.Conn. 1998); *Pelchat v. UNUM Life Ins. Co. of America*, No. 3:02CV7282,

> Instead of viewing defendants' requirement for "objective evidence" as being in derogation of the policy, the District Court superimposed its own definition of "objective evidence." It inferentially reasoned that because the policy requires proof of loss (*see* A-111), "the very concept of proof connotes objectivity" (A-1162). Of course, the "proof of loss" required by the Policy merely implies required documentation (i.e. medical records) and has no provision for dismissing subjective complaints.[3]

C. *The District Court Unreasonably Dismissed Petitioner's Subjective Complaints And Ignored Jurisprudence Acknowledging The Viability Of Claims Based Upon Chronic Fatigue Syndrome and Fibromyalgia*

Petitioner then cited *Connors v. Connecticut Gen'l Life Ins. Co.*, 272 F.3d 127, 136-37 (2d Cir. 2001) for the Second Circuit's numerous cases holding that subjective complaints may not be dismissed as legally insufficient evidence of disability. With respect to petitioner's CFS and FM (as illnesses in addition to her lumbar spine injury which the district court found "subjective"), it was noted (Principal Brief at 27) that:

2003 WL 21105075 (N.D.Ohio May 12, 2003) (*citing Mitchell* and *Florence Nightingale*) and *Saffle v. Sierra Pacific Power Co.*, 85 F.3d 455, 460 (9th Cir. 1996).

[3] *Cf. Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 251 (2d Cir. 1999) (insurer's claim, that discretionary authority was conferred by language saying they'll pay benefits if insured, "submits satisfactory proof of Total Disability to us," was rejected by this Court as unclear:

> Since language can be readily drafted and included in policies . . . courts should require clear language and decline to search in semantic swamps for arguable grants of discretion.

Similarly, the district court may not infer that requiring proof of disability "connotes" a requirement for *material objective evidence.*

a substantial jurisprudence recognizes CFS[4] as a basis for disability benefits, in both ERISA and Social Security claims, *e.g. Sansavera v. E.I. DuPont de Nemours & Co.*, 859 F.Supp. 106, 113 (S.D.N.Y. 1994); *Locher v. UNUM Life Ins. Co. of America*, 126 F.Supp.2d 769, 775 (S.D.N.Y. 2001); *Hilton v. Apfel*, 56 Soc.Sec.Rep.Serv. 156, 1998 WL 241616 (S.D.N.Y. 1998); *Lunan v. Apfel*, 67 Soc.Sec.Rep.Serv. 114, 2000 WL 287988 (N.D.N.Y); *Rose v. Shalala*, 34 F.3d 13 (1st Cir. 1994); *Hallgring v. Callahan*, 975 F.Supp. 84 (D.Mass. 1997); *Cohen v. Secretary*, 964 F.2d 524 (6th Cir. 1992); *Mitchell v. Eastman Kodak Co.*, 910 F.Supp. 1044 (M.D.Pa. 1995) *aff'd* 113 F.3d 433 (3d Cir. 1997); *Opgenorth v. Shalala*, 897 F.Supp. 1199 (E.D.Wis. 1995); *Friedrich v. Intel Corp.*, 181 F.3d 1105 (9th Cir. 1999); *Reddick v. Chater*, 157 F.3d 715 (9th Cir. 1998); *Sisco v. Dept. of HHS*, 10 F.3d 739 (10th Cir. 1993); *Clausen v. Standard Ins. Co.*, 961 F.Supp. 1446 (D.Col. 1997). In doing so, the cases recognize that there is no "dipstick test" for CFS, *Sisco*, 10 F.3d at 743-44, that it is a diagnosis of exclusion, *Clausen*, 961 F.Supp. at 1456, and one that is arrived at by scientific method (including clinical examination, laboratory and diagnostic tests), *Sansavera*, 859 F.Supp. at 113.

---

[4] The most widely accepted definition of CFS was published by an international group of doctors sponsored by the Centers for Disease Control: Fukuda, K. "The Chronic Fatigue Syndrome: A Comprehensive Approach to its Definition and Study," *Annals of Internal Medicine*, 1994: 121:953-959. Dr. Podell's report provided the CDC's definition for CFS, which indicates that the symptoms must persist for at least six months (to qualify for the diagnosis). While the cause of CFS remains unknown, neither the Policy nor the Plan requires proof of causation. Scientists have reason to believe that CFS may be viral, that it affects the brain, and have noted various neurological and immune system abnormalities. Komaroff, A.L. "The Physical Basis of CFS," *CFS Research Review* (CFIDS Assoc. of America) vol. 1, issue 2 (Spring 2000).

Petitioner also noted (Principal Brief at 30) that courts:

> have also recognized that FM is a diagnosable and recognized sickness that can cause disability, *see e.g.*, *Russell v. UNUM Life Ins. Co. of America*, 40 F.Supp.2d 747 (D.S.C. 1999); *Monroe v. Pacific Telesis Group Comprehensive Disability Benefits Plan*, 971 F.Supp. 1310 (C.D.Cal. 1997); *Weiler v. Shalala*, 922 F.Supp. 689 (D.Mass. 1996); *DeCastris v. State Employees Retirement System Of Illinois*, 679 N.E.2d 825 (Ill. 1997); *Sarchet v. Chater*, 78 F.3d 305 (7th Cir. 1996).[5]

D. *The District Court's Misunderstanding of CFS And Its Scientific Basis As Applied To Petitioner's Claim And The District Court's Erroneous Limitation Of "Objective Material Evidence" To The Post-Surgical MRI (Which Was Misconstrued)*

Petitioner also addressed the district court's skepticism relating to CFS and FM (Principal Brief at 28):

> Because CFS is a diagnosis of exclusion, and one that may not be made until after the individual has been symptomatic for six months, it is common for those afflicted to be misdiagnosed at onset of the illness, and to see several physicians (to rule out other conditions which may be expected to cause severe and chronic fatigue) before finding out what's wrong with them. *See Mitchell*, 113 F.3d at 441. Thus, the District Court's adoption of UNUM's skepticism of plaintiff's late diagnosis of CFS and FM suggests ignorance regarding the diagnostic criteria for CFS.[6]

---

[5] The diagnostic criteria for FM may be found in Wolfe, F., "The American College of Rheumatology 1990 Criteria For the Classification of Fibromyalgia," 33 *Arthritis and Rheumatism* 160-72 (Feb. 1990).

[6] The District Court also suggested skepticism of plaintiff's claim regarding CFS and FM was warranted, since "she claimed that she had been suffering from both for years. AR 80" (A-1163-64). However, "AR

Lastly, petitioner's reply brief also focused on respondents' mischaracterizations of her injuries and illnesses as merely "subjective complaints" (Reply Brief at 9-11). Aside from the post-surgical MRI of May 1998, which revealed pathology at the same level as her September 1997 surgery (*Id.*):

> Dr. Collias saw her in June 1998 and his review of the films suggested a possible "retained fragment" at S1 (A-226). Dr. Cammisa's impression of the films (also in June 1998) was of a "Recurrent herniated nucleous pulposis, left L5-S1, with degenerative disease" (A-223). In August 1999, Dr. O'Leary (A-185) suggested rehabilitation and, if no improvement after six months then "she might need a spinal fusion at the L5/S1 segment". In November 1999, Dr. Simotas (A-184) also thought it was possible she might have a disc fragment in the left S1 foramen. Dr. Balensweig (A-163-75) also felt Maniatty had "a recurrent disc herniation in the left foramen at L5-S1" and, although he compliments Dr. Lavyne as a surgeon, he recommends further spinal surgery with Dr. O'Leary. Even UNUMProvident admitted that (A-254, Opposition at 16): "there is objective evidence of degenerative disk disease of the lower spine demonstrated by a small disk protrusion at L5-S1 on MRI and a history of lumbar surgery 9/97. This would result in some reasonable restrictions and limitations."

Thus the District Court's claim that there is a "virtual absence of any material objective evidence to support plaintiff's claim" (A-1163) is simply false. The bar, however, was then raised by UNUMProvident, in its persistent badgering of

---

80" (A-127) is plaintiff's appeal letter and offers no such "claim." Moreover, by all accounts within the record regarding plaintiff's CFS and FM (e.g., A-129 (Dr. Podell), A-135 (Dr. Levine), and A-252 (UNUM's review), those illnesses were diagnosed two years after her September 1997 spinal surgery, and were not pre-existing conditions.

Dr. Lavyne, to demonstrable neurological findings on clinical examination. Dr. Lavyne admitted that she did not have reflex deficits and that he didn't test for sensory deficits (A-176), but did find "residual weakness in the left lower extremity" (A-183), and stated (A-176): "Regardless of the presence or absence of neurologic deficits, she is in pain and unable to return to work." Maniatty's physical therapist also found "[s]igns and symptoms consistent with S/P micro-diskectomy" (A-188), including radiating pain and weakness in the left lower extremity, which caused severe pain with sitting.

Petitioner then noted (Reply Brief at 11-12):

> CFS is recognized by the Centers for Disease Control ["CDC"] as a sickness (Brief at fn. 19) and by the case law as a sickness which may result in disability (Brief at 27). FM is likewise recognized by the American College of Rheumatology as a sickness (Brief at fn. 23) and by the case law as a sickness which may result in disability (Brief at 30).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FUSCO, BRANDENSTEIN & RADA, P.C.
By: ABA HEIMAN, ESQ.
Attorneys for Petitioner
180 Froehlich Farm Boulevard
Woodbury, New York 11797
(516) 496-0400

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

Linda MANIATTY,

Plaintiff-Appellant,

v.

UNUMPROVIDENT CORPORATION, First Unum Life Insurance Company, SBC Group Long Term Disability Plan, UBS Warburg Long Term Disability Plan, and UBS AG Long Term Disability Plan (and Successors in Interest),

Defendants-Appellees.

No. 02-9105
May 15, 2003

Upon Due Consideration of this appeal from the United States District Court for the Southern District of New York (Rakoff, *J.*), it is hereby.

Aba Heiman, Fusco, Brandenstein & Rada, P.C., Woodbury, NY, for Plaintiff-Appellant.

Louis M. Lagalante, Gallagher, Harnett & Lagalante LLP, New York, NY, for Defendants-Appellees.

Present: OAKES, WINTER, and KATZMANN,
Circuit Judges.

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of May, two thousand and three.

ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED.**

Plaintiff Linda Maniatty appeals from the judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*) affirming defendants' final administrative determination terminating plaintiff's long-term disability benefits.[1]

Plaintiff bore the burden of demonstrating that she was entitled to long term disability benefits under her policy, *see Juliano v. Health Maint. Org. of N.J.*, 221 F.3d 279, 287 (2d Cir. 2000), that is, that she is unable to perform each of the material duties of her regular occupation because of injury or sickness. Having conducted a thorough review of the evidence adduced by plaintiff to support her claim of disability due to back pain. chronic fatigue syndrome, and fibromyalgia, we conclude that the administrator did not commit a clear error of judgment or otherwise abuse its discretion in finding that plaintiff had failed to demonstrate that she is unable to perform each of the material duties of her regular occupation because of injury or sickness. We have considered all of plaintiff's arguments and find them to be without merit.

Accordingly, the judgment of the District Court is **AFFIRMED**.

---

[1] "A civil action may be brought (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a).

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

Linda MANIATTY,

Plaintiff,

v.

UNUMPROVIDENT CORPORATION, First UNUM Life Insurance Corporation, SBC Group Long Term Disability Plan, UBS Warburg Long Term Disability Plan, UBS AG Long Term Disability Plan (and successors in interest),

Defendants.

No. 01 Civ. 0209 (JSR)
Aug. 29, 2002

Beneficiary of an Employee Retirement Income Security Act (ERISA) disability plan sued the plan administrator, challenging the termination of long-term disability benefits. The District Court, Rakoff, *J.*, held that: (1) arbitrary and capricious standard of review applied, and (2) denial of continued benefits was not arbitrary and capricious, absent objective evidence supporting subjective complaints of pain.

Ordered accordingly.

Aba Heiman, Scheine, Fusco, Brandenstein & Rada, P.C., Woodbury, NY, for plaintiff.

Louis Michael Lagalante, Gallagher, Harnett & Lagalante, LLP, New York City, for defendants.

MEMORANDUM ORDER

RAKOFF, *District Judge.*

On September 23, 1997, plaintiff Linda Maniatty, at that time employed at the Swiss Bank Corporation ("SBC"), underwent back surgery. Thereafter, on January 20, 1998, she ceased working as a result of back pain and applied for disability benefits under the SBC Disability Plan (subsequently replaced by the UBS AG Disability Plan). From January 26, 1998 to July 9, 1998, she received short-term disability benefits and thereafter collected long-term benefits until October 18, 1999, when defendants terminated her benefits on the ground that she was no longer "disabled" under the definition of the applicable benefits plan. After the plan administrator (First UNUM Life Insurance Corporation and its parent, UNUM Provident Corporation, herein collectively referred to as "UNUM") upheld the termination of benefits, plaintiff commenced this action under ERISA, 29 U.S.C. § 1132(a)(1)(B), challenging that determination. By agreement of the parties, the matter is now presented to the Court, on a largely stipulated record, for final determination.

"'[D]enial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator'. . . discretionary authority to interpret the plan." *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1254 (2d Cir. 1996) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)). When the administrator has such discretionary authority, the administrator's decision is to be reviewed for abuse of discretion, applying an "arbitrary and capricious" standard. *Sullivan*, at 1254. An exception to such deferential review occurs, however, when the administrator has a conflict of interest and the evidence shows that the administrator was "in fact influenced by the conflict of interest," in which case the denial of benefits should is [sic] reviewed *de novo*. *Id.* at 1256.

Plaintiff concedes that the plan here applicable, as evidenced by a 1997 Summary Plan Description ("SPD"), provides the administrator with the kind of discretionary authority that would ordinarily lead to a deferential standard of review. *See* transcript of oral argument of August 8, 2001 ("tr."), at 15.[2] Specifically, page 15 of § 3.2 of the 1997 SPD provides that the plan administrator has "the sole authority to interpret the terms of the insurance policies . . . and determine whether benefits are payable, and the sole responsibility for making any benefit payments." *See also id.* § 3.7.[3] Plaintiff argues, however, that UNUM had an "inherent" conflict of interest because it paid beneficiaries from its own assets rather than from the assets of the trust.

However, as plaintiff admits, the existence of such a conflict is not sufficient to alter the standard of review unless the plaintiff can show that the conflict influenced the determination. *See Sullivan*, 82 F.3d at 1255. Plaintiff has wholly failed to meet that burden. Specifically, even after being given repeated opportunities to adduce such evidence, all plaintiff could produce was an indication that, some years after the plaintiff had challenged the termination of her long-term benefits by claiming, *inter alia*, that she now suffered not just from back pain but also from chronic fatigue syndrome,

---

[2] Prior to making this concession, plaintiff challenged the admissibility of the SPD on a basis of alleged discovery violations, but after plaintiff's counsel twice conceded in open court that plaintiff was not prejudiced by the violations, *see* tr. at 13-14, the Court overruled the objection. Despite these concessions, plaintiff's counsel subsequently sought reconsideration of that ruling, on no better basis than that he now thinks the introduction of the SPD hurts his case. *See* Plaintiff's Reply to Defendants' Submission, at 1. This frivolous motion for reconsideration is hereby denied.

[3] *See also* the "Plain Facts" section of the revised 1999 SPD: "the plan administrator . . . shall have primary authority and responsibility . . . to [i]nterpret [the plan's] provisions and construe all of its terms, [e]stablish and enforce . . . rules and regulations, [and] determine eligibility the entitlements and amount of benefits that shall be payable."

UNUM introduced a plan, growing out of a pilot program in Atlanta, to limit benefits to new customers claiming chronic fatigue syndrome. This does not remotely begin to carry plaintiff's burden to demonstrate that the plan administrators were influenced by a conflict of interest in the prior adjudication of a claim made by a beneficiary of a prior plan.

Accordingly, the Court reviews the administrator's determination under an arbitrary and capricious standard. Specifically, a court may set aside a decision to deny benefits as "arbitrary and capricious" only if it was "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir. 1995) (citation omitted). As the *Pagan* court explained: "This scope of review is narrow, [and] thus we are not free to substitute our own judgment for that of the [plan administrator] as if we were considering the issue of eligibility anew." *Id.* *See also Jordan v. Retirement Comm. of Rensselaer Polytechnic Inst.*, 46 F.3d 1264, 1271 (2d Cir. 1995).

At a minimum, the administrative record ("AR") of this case shows the following. Until September, 1997, plaintiff worked as a bond trader at SBC. Much of her day was spent sitting, talking on the telephone or doing paperwork. AR 476-479. After plaintiff had back surgery on September 23, 1997, she returned to work, but, as noted above, stopped working on January 20, 1998, complaining of continuing pain in the area where she had had back surgery. She promptly submitted a claim for short-term disability benefits, which was approved and paid until July 1998, when, based on plaintiff's assertion that her back problems persisted, defendants began to pay long-term disability benefits. AR 458, 515, 531-545.

In October 1999, however, UNUM notified plaintiff that it would no longer continue to pay benefits because of a lack of objective evidence of continuing "disability," as defined by

the applicable benefits plan. AR 266-267.[4] This initial decision to terminate plaintiff's long-term benefits was based primarily on the administrator's analysis of (a) reports by plaintiff's own doctors, (b) the report of a UNUM representative who met with plaintiff in May 1999, and (c) summary reports by a UNUM reviewing doctor and a reviewing nurse. *See* AR 266-267. With respect to the report of plaintiff's own doctor, one surgeon, Dr. Camissa, thought plaintiff's continuing pain was caused by a "chip in her back"; the surgeon who performed the operation, Dr. Lavyne, described the pain as "residual of nerve injury" and thought the injury would not improve; and a third doctor, Dr. Hart, reported sedentary capacity. AR 295-96. The UNUM representative noted plaintiff's complaints of pain and inability to sit, but also described "inconsistencies" based on the fact that she did not take pain medication, did not have trouble sleeping, walked two miles every day, and swam three times a week. AR 295-97. Finally, the reviewing doctors and nurse noted that even though Dr. Lavyne performed a number of diagnostic tests, he found no evidence of any musculoskeletal or neurological deficit nor any other disorder that would explain the pain described by plaintiff. The UNUM report found that plaintiff's complaint was therefore "subjective in nature, without objective evidence for continued lumbar dysfunction," AR 266, 280, and, on this basis, concluded that plaintiff was no longer disabled. AR 266-67. Plaintiff appealed.

In her initial appeal, plaintiff submitted a new report from Dr. Lavyne stating that plaintiff's "chronic back pain is disabling her . . . [and she is] unable to return to work." AR 247.

---

[4] The plan defined " 'Disability' and 'disabled' [to] mean that because of injury or sickness: 1. the insured cannot perform each of the material duties of his regular occupation; and 2. after benefits have been paid for 24 months, the insured cannot perform each of the material duties of any gainful occupation for which he is reasonably fitted, taking into consideration training, education or experience, as well as prior earnings." AR 51.

Yet the surgeon could still not point to any objective evidence supporting plaintiff's pain complaints, and UNUM's reviewing physician thus concluded that the evidence of pain was purely subjective and that there was no reason to reopen the case. AR 244. A Quality Review confirmed this decision. AR 221-22.

Plaintiff then took a final appeal, known as the "Final Administration Review." As part of this appeal, plaintiff claimed, for the first time ever, that, in addition to her back pain, she suffered from chronic fatigue syndrome and fibromyalgia, a related illness. Plaintiff submitted, *inter alia*, reports from two new doctors, Dr. Levine and Dr. Podell, purporting to support these new assertions, but again the findings were largely based on the plaintiff's own subjective reports. After reviewing all of the records, the reviewing physician noted that plaintiff's "subjective symptoms have consistently exceeded her objective findings," AR 207, and that the purely objective evidence indicated that plaintiff should be able to work an eight-hour day, provided she changed positions and periodically stood and walked, rather than just sit. *Id.* at 207-208. A vocational consultant retained by UNUM essentially agreed with the reviewing physician. *See* AR 191-194. Once again, plaintiff's appeal was denied.

Before this Court, plaintiff argues that the foregoing determinations were arbitrary and capricious principally because they placed more reliance on the analyses of the reviewing physicians than on the conclusions of the physicians who actually examined plaintiff and also because they demanded objective evidence when subjective statements of pain should have been sufficient. The former argument really collapses into the latter, however, because the administrator, far from ignoring the reports of the treating physicians, heavily relied on the fact that none of them adduced any objective evidence of plaintiff's complaints. In these circumstances, it was not unreasonable for the administrator to conclude that the only

material reason the treating physicians were reaching their diagnoses was based on their acceptance of plaintiff's subjective complaints: an acceptance more or less required of treating physicians, but by no means required of the administrator.

While plaintiff argues that the plan itself does not state that objective evidence is necessary to establish disability, the plan does state that "proof" of continued disability must be provided, AR 64, and the very concept of proof connotes objectivity. In any event it is hardly unreasonable for the administrator to require an objective component to such proof. *See Bailey v. Provident Life & Accident Ins. Co.*, 3: 99 cv 394/LAC (D.C. Fla. June 13, 2000) ("Although . . . subjective information should be considered, . . . reliance on such complaints, without more, would result in insurance companies paying virtually all claims . . . Therefore, Provident acted appropriately in rejecting Bailey's claim when it found insufficient objective support for a long-term disability claim.").

Thus, given the virtual absence of any material objective evidence to support plaintiff's claim, it can hardly be said that the administrator acted in an arbitrary and capricious matter in rejecting plaintiff's claims. Indeed, even if this Court were to apply a *de novo* standard of review, the same results would follow, for virtually the only objective evidence in the administrative record regarding plaintiff's allegedly continuing back pain is an MRI that showed a "small recurrent disc herniation" in 1998, well before defendants terminated their disability payments to plaintiff. AR 136. All subsequent tests designed to uncover neurological damage were negative (although another of plaintiff's physicians, Dr. Balensweig, did detect some mildly reduced reflexes on plaintiff's left side). AR 1201-1, 126, 132-36, 302, 431-432, 444, 519. This hardly constitutes a sufficient basis for any reasonable conclusion that plaintiff was so disabled as to

qualify for long-term benefits, as opposed to being able to return to work under reasonable restrictions and limitations. AR 208.

With regard to the claims of chronic fatigue syndrome and fibromyalgia, the very fact that plaintiff did not raise these alleged ailments under her final appeal — even though she claimed that she had been suffering from both for years, AR 80 — is reason for skepticism. Once again, moreover, there is no material objective evidence of record establishing either ailment, just plaintiff's subjective reports. Without such evidence, the Court would reject these claims even under a *de novo* standard, and certainly it was reasonable for the administrator to do so. *See John v. Noe*, 1998 WL 80199, *5, 1998 U.S. Dist. LEXIS 2016, *16 (S.D.N.Y. 1996).

Accordingly, for the foregoing reasons, the Clerk is directed to enter judgment dismissing the Complaint with prejudice and awarding judgment to defendants.

SO ORDERED.